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Supreme Court, U.S.
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No. 04-719

In the Supreme Court of the United States

WAYNE T. ZIEGLER,

Petitioner,

versus

BANK OF AMERICA

Respondent,

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED FOR REVIEW IN THE WRIT OF CERTIOARI

I. Does a Chapter 7 debtor have standing if scheduled assets exceed creditor claims?

II. Does a Chapter 7 debtor have standing when they re-open their case, file amended asset schedules, and a trustee is not appointed?

III. When a defense is decided against a defendant in a prior action, are they estopped from asserting the defense again in a subsequent federal action?

IV. Did the Ninth Circuit err in finding the petitioner's conspiracy to produce forged bank statements cause barred by the civil RICO dismissal in Case 95-2706GHK?

V. Does the California Vexatious Litigant Statute (California Code of Civil Procedure §391 et al) violate the 14th Amendment guarantee of equal protection of the law?

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STATEMENT

The petitioner has filed this supplemental brief to bring to this Court's attention legal authorities that the petitioner had not discovered prior to filing the writ. The respondent elected not to file a brief with this Court, which is understandable since the bank's conduct since the petitioner first filed suit on the conspiracy to produce forged bank statements is, quite frankly, indefensible.

The petitioner's writ has been brought under the Supreme Court Rule 10(a), where the third question presented for review is to resolve a conflict in the decision of two Circuit Courts of Appeal on the same question.

The Supreme Court has addressed similar conflicts, notably in patent infringement suits, *Honolulu Oil Corporation, Ltd. V. Halliburton*, 306 U.S. 550 (1939), *Expanded Metal Co. v. Bradford*, 214 U.S. 366 (1909). The bar effect of a federal judgment on a state law claim is as important a question of law as the validity of a patent.

The petitioner first addresses in this supplemental brief federal authorities that answer in the affirmative the two questions raised involving the debtor's standing to represent his estate in litigation.

The petitioner has, in his writ, clearly explained how the 9th Circuit erred in finding Cause V alleging a conspiracy under California law to produce forged bank statements as barred by a 3-fact civil RICO dismissal in Case 95-2706GHK. This point is persuasively made in the petitioner's explanation of how the evidence supporting the civil RICO cause does not prove the conspiracy to produce forged bank statements. The petitioner will further support the argument that a defense decided against a defendant should be estopped from being asserted in a subsequent federal proceeding based on federal cases governing collateral estoppel and res judicata.

The petitioner will also supply additional federal cases supporting the claim that the California Vexatious Litigant statute violates the 14th Amendment.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT ERRED IN FINDING THE DEBTOR DID NOT HAVE STANDING AFTER HAVING RE-OPENED HIS BANKRUPTCY CASE, AND A TRUSTEE WAS NOT APPOINTED.

Since filing the writ, the petitioner located a case, *Matter of First Colonial Corp. of America*, 544 F.2d 1297(5th Cir., 1977), determining that a debtor has standing when their bankruptcy estate is solvent. While not citing a decision of this Court, the grounds are consistent with this Court's rules governing standing as explained in *E. F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979(11th Cir. 1990). As the petitioner has explained in his writ(pg. 14), the estate's asset claims total $39,243.06, and exceed creditor claims of $25,233.04, by $14,010.02.

The petitioner also located the Supreme Court's decision in *Danciger v. Smith*, 276 U.S. 542 (1928), where this court held a debtor has standing when a trustee is not appointed. This case is certainly applicable when a bankruptcy case is re-opened since, pursuant to Bankruptcy Rule 5010, a trustee will not be appointed unless the Bankruptcy Court determines that it is necessary.

The Circuits have, presumably, relied upon the *Danciger(supra)* precedent in adopting the rule that a debtor has standing when they re-open their bankruptcy case and obtain Bankruptcy Court approval to pursue the estate's claims in litigation, *Cusano v. Klein* 264 F.3d 936 (9th Cir. 2001), *Pealo v. AAF McQuay, Inc.* 140 Supp.2d 233(3rd Cir. 2001).

These cases have followed the rationale the Supreme Court expressed in *Johnson v. Collier*, 222 U.S. 538 (1912), where it was held that, since it is to the benefit of the estate creditors, a debtor should be permitted to pursue estate claims when a trustee is not appointed.

In *Matter of First Colonial Corp. of America(supra)*, the Bankruptcy Court granted the majority shareholder's mo-

tion to intervene. The Appeals Court found this decision to be binding on all courts in subsequent proceedings.

As the petitioner explained in his writ(pgs. 14, 15), in the order vacating the re-opening of the estate, the Honorable Judge Dooley expressly stated that the petitioner could pursue the estate's litigation(94a-95a):

4. That it would be in the best interests of creditors and of the debtor for the court to vacate the order entered herein on August 21, 1990 reopening debtor's bankruptcy case and allow the debtor to continue to litigate against the Bank of America in the state courts, if he desires todo so;

When a Bankruptcy Court has expressly stated in its order that a debtor can pursue the estate's litigation, the parties are bound by that decision, and no court in a subsequent proceeding has the discretion to overrule the Bankruptcy Court's directive.

The petitioner has shown how according to federal case law, he has standing since he has a cognizable interest in the estate, how the Bankruptcy Court expressly stated that the petitioner could pursue the litigation in its January 30, 1992, order, and how pursuant to this Court's determination in *Danciger v. Smith(supra)*, the petitioner has standing since a trustee was not appointed to pursue the estate's claims after the bankruptcy case was reopened and amended schedules were filed in 1990.

The 9th Circuit's reliance on *First Nat. Bank of Jacksboro v. Lasater*, 196 U.S. 115 (1905), is erroneous, the petitioner commenced suit to recover the estate funds after filing amended schedules bringing these claims to the attention of the Office of the U.S. Trustee in 1990. In the absence of the appointment of a trustee, the petitioner has standing based on the legal authorities cited above.

The Supreme Court should summarily reverse the 9th Circuit's decision on this ground or grant the writ on Questions 1 & 2 to allow the Court to decide these issues.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL AS CODIFIED IN C.J.S. §774 IS APPLICABLE TO BARRING A DEFENDANT FROM ASSERTING A DEFENSE DECIDED AGAINST THE PARTY IN A PRIOR PROCEEDING.

In petitioner's writ, the Supreme Court ruling in *Chicot County Dist. v. Bank* 308 U.S. 371 (1939) was cited as supportive of the rule of law in Corpus Juris Secundum §774, barring a defendant from raising a defense decided against the defendant in a prior proceeding in this action.

The principal of collateral estoppel has been widely applied be the federal courts in criminal cases, *Ashe v. Swenson,* 397 U.S. 436 (1970). This principle has also been applied when a person charged with a crime has been acquitted on the first charge, *Turner v. Arkansas,* 407 U.S. 366 (1972), *Harris v. Washington,* 404 U.S. 55 (1971), *Simpson v. Florida,* 403 U.S. 384 (1971).

The Supreme Court has upheld the doctrine of collaterol estoppel in civil cases as well, *Underwriters Assur. Co. v. N.C. Guaranty Assn.,* 455 U.S. 691 (1982), *Montana v. United States* 440 U.S. 147 (1979).

The Corpus Juris Secundum §774 has been applied by the federal courts. In *Tonka Corp. v. Rose Art Indus.,* 836 F.Supp. 200 (1993), the District Court applied the rule to bar a defendant's counterclaim. This same rule was applied by the Ninth Circuit in *Bank of Montreal v. Kough* 612 F.2d 467 (9th Cir. 1980) to bar a counterclaim. The principle of collateral estoppel has also been applied in Tax Court cases, *U. S. v. Shanbaum* 10 F.3d 305 (1994).

In *U. S. v. Milestone Enterprises, Inc.* 864 F.2d 21 (3rd Cir. 1988), the Appeals Court held that the doctrine of res judicata precluded the reexamination of whether an Internal Revenue summons was based on illegally obtained wiretap evidence, where that defense had been rejected in a prior enforcement action and order.

The questions of res judicata and collateral estoppel apply when the same question of fact or law is raised in a

prior proceeding. There is no justification for applying the doctrine solely to claims raised by the plaintiff to an action, but to defenses raised and decided against a defendant in a prior action as well. If this were not an equitable remedy, the rule would not be specified in the Corpus Juris Secundum §774.

In the petitioner's instance, there has been a change in the number of facts alleged in the conspiracy to produce forged bank statements between the Appeals in the Fifth Circuit and the Ninth Circuit, with 9 overt acts alleged in the First Amended Complaint. However, as pointed in the petitioner's writ, the evidence proving the civil RICO claim in Case 95-2706GHK does not prove the conspiracy to produce forged bank statements, regardless of how many overt acts are alleged in the cause.

The 9th Circuit Court of Appeals abused its discretion in failing to follow the rules of res judicata formulated in *Costantini v. Trans World Airlines* 681 F.2d 1199 (9th Cir. 1982), where the civil RICO cause and the conspiracy to produce forged bank statements do not involve the infringement of the same rights. The causes do not have the same nucleus of facts and the 9th Circuit's decision does not conform with the Supreme Court rules of res judicata as explained in *Blonder-Tongue v. University Foundation,* 402 U.S. 313 (1971).

The petitioner has provided the Court with sufficient federal case authority in this supplemental brief for the Supreme Court to decide if the justifications explained herein and embodied in the Corpus Juris Secundum §774 should be integrated into federal case law.

If the Supreme Court has already decided this question in the affirmative, then that decision, and the showing in petitioner's writ that the Fifth Circuit correctly found the civil RICO cause as not barring the conspiracy to produce forged evidence would support the Court's resolution of the circuit conflict presented here by summararily reversing the Ninth Circuit decision, and remanding this cause for an adjudication on the merits in the lower court.

III. THE CALIFORNIA VEXATIOUS LITIGANT STATUTE DEPRIVED THE ESTATE OF EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE 14TH AMENDMENT

In the petitioner's writ(pages 25-28), the petitioner stressed how the bank's vexatious litigant motions filed in both L.A. Superior Court proceedings, failed to comply with the requirement in C.C.P. §391.6, which requires a defendant's motion to show that the in pro se party lacks a reasonable probability of prevailing in the action.

The bank's failure to follow this statutory requirement, and the Superior Court's failure to enforce it, present the type of situation that the Supreme Court has characterized as a denial of procedural due process, which is why the petitioner supported the discussion in the writ with citations to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *Cleveland Board of Education v. Loudermill*, 470 U. S. 532 (1985).

The petitioner did not address the question in his writ whether a state's imposition of the requirement to post security before a California Court will even advise the plaintiff if he has stated a cognizable claim, also denies the plaintiff in the action equal protection of the law.

The petitioner cited this court's decision in *Little v. Streater*, 452 U. S. 1 (1981), where the Court held that a court's imposition of a fee for blood grouping tests to confirm whether the alleged father was the true father was a violation of the Fourteenth Amendment. The reasoning in this case has been followed in other cases, in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), the Supreme Court ruled that a utilities' discontinuance of service without allowing a fair opportunity to respond violated the homeowner's due process rights. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court held that a state's imposition of court fees on an indigent seeking to pursue a divorce proceeding deprived the indigent party of equal protection of the law.

These cases underscore the fact that a party who pays a filing fee in a Superior Court should be entitled to some standard of minimum fair hearing requirements in return for the filing cost of the suit. The "reasonable probability" standard in the California Vexatious Litigant statute deprives in pro se litigants in California courts of this minimum fair hearing requirement.

When a party files an action and pays a fee, they should be entitled to having the Court answer the question, have they have stated a viable cause of action?

In *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Supreme Court ruled that a use fee imposed by a municipality wrongful classified retarded residents of the center, and that the classification did not serve a compelling state interest.

Every state has a right to control frivolous litigation, however the state also has the constitutional duty to implement such controls in a manner that does not deprive a person with a legitimate claim of a fair day in court.

The California Vexatious Litigant statute classifies individuals without an attorney as a "quasi-suspect" class, while at the same time denying them any entitlement to a determination on whether they have stated any viable causes of action. The record in the appendix in support of this writ makes this conclusion readily apparent.

The Supreme Court has classified this type of deprivation as a denial of substantive due process. The Supreme Court has addressed invalid classifications in numerous cases. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court found Tennessee's restriction on the exercise of voting rights based on residency time requirements as invalid. In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court found New Mexico's residency requirement as violative of equal protection of the law for Vietnam veterans who moved to the state after May 8, 1976. In *Moore v. East Cleveland*, 431 U.S. 494 (1977), the Court determined that a housing ordinance that strictly defined "a family", deprived a grandmother and her two

grandsons of equal protection of the law. In *Zobel v. Williams*, 457 U.S. 55 (1982), the Court held an Alaska distribution plan as violating the equal protection rights of residents based on their length of residency in the state. In *Plyler v. Doe*, 457 U. S. 202 (1982), the Court held that a Texas statute that limited state funds to schools to those students "legally admitted" to the state, deprived resident aliens of equal protection of the law.

In all of these cases, the Supreme Court alluded to the fact that none of the classifications by the state or municipalities involved, served any compelling state interest.

The California Vexatious Litigant statute classifies any person without an attorney as a suspect class, when a person's lack of an attorney is not a wrong.

The civil immunity that California Civil Code §47 gives to attorneys practicing law in California easily allows a defendant's attorney to fabricate misconduct on the in pro se plaintiff's part, since the attorney's conduct does not violate any law. When registered California attorneys are essentially given a license to practice fraud in the California courts, what protection does any in pro se litigant have that assures their due process rights will be respected in a California Superior Court?

As the petitioner has shown in his writ and supporting appendix filed with this Court, there is no protection. Equal protection of the law is a myth in California courts, as long as the California Vexatious Litigant statute remains in force as currently enacted.

California, and every state, have a right to control their civil proceedings, but they do not have the right to deny access to their courts. The state has a legitimate interest in controlling its court system, but as long as the California Vexatious Litigant Statute fails to incorporate more definitive requirements to assure an pro se litigant's due process rights are respected, the results the petitioner encountered in the Los Angeles Superior Courts and the California Court of Appeals between 1991 and 1994 will become a staple of California jurisprudence.

The petitioner has put his best efforts forward to try to inform the Supreme Court of the applicable federal case law that that applies to the petitioner's challenge to the California Vexatious Litigant Statute(California Code of Civil Procedure §391 et al).

Because of statute of limitations restrictions, the petitioner was required to re-file suit, and chose the Los Angeles Superior Court, again, since that is where the late, Honorable Bankruptcy Judge Dooley directed the petitioner to file suit in his order vacating the re-opening of the Bankruptcy case(94a). Should the Supreme Court grant the writ of certiorari, the petitioner would dismiss the state action.

The petitioner is hopeful that the Supreme Court would grant the petitioner's writ, especially on the basis of the challenge to the California Vexatious Litigant statute, since this is a question that many past in pro se litigants and many future in pro se litigants in California would like to see addressed by this good country's highest court.

CONCLUSION

In this supplemental brief, the petitioner has provided the Supreme Court with reliable decisions of the lower court's attesting to how a debtor with a solvent estate has standing to represent their bankruptcy case in litigation, and now pursuant to this Court's decision in *Danciger v. Smith*, 276 U.S. 542 (1928), the petitioner has standing in the absence of the appointment of a trustee in 1990.

The petitioner's submission of the questions on a debtor's standing would afford the Supreme Court with the opportunity to give a more limited context to the rule of law in *Danciger(supra)*, since some people would erroneously suggest that the court sanctioned the non-disclosure of assets by a bankrupt in this ruling. That interpretation is, of course, erroneous, the Supreme Court merely

provided a remedy for the creditors when a trustee is not appointed to pursue a bankrupt's litigation.

The petitioner has shown in his writ how the Ninth Circuit erred in finding Cause V of the First Amended Complaint, alleging the bank engaged in a conspiracy to produce forged bank statements for the estate's Lodi Main and Noe Valley accounts as barred by the civil RICO dismissal in Case 95-2706GHK. The petitioner would hope that the Supreme Court would not leave the current conflict in the Circuit Court of Appeals on this question in its current state.

The petitioner has also provided the Supreme Court with additional authority with which the Court can decide whether to allow briefing on the question whether when a defense is decided against a defendant in a prior action, they are estopped from asserting the defense in a subequent action. The petitioner believes a review of this question would be useful to the federal court system.

The petitioner has supplied a convincing enough explanation for his challenge to the California Vexatious Litigant statute as violative of the 14th Amendment guarantee of equal protection of the law. Given the number of California residents who could be adversely affected by this statute in the same way the petitioner's bankruptcy estate was, the petitioner would hope this Court would grant the writ of certiorari on this question.

For the reasons stated in the petitioner's writ of certioari and in this supplemental brief, the petitioner respectfully requests that the Supreme Court grant the writ, or summarily reverse the Ninth Circuit's decision on the basis of the reasons supplied in the writ and this supplemental brief.

Respectfully Submitted

Wayne T. Ziegler, petitioner
in pro se